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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1957

No. 876

WILLS LINES, INC.,

Petitioner,

*against*

TANKPORT TERMINALS, INC.,

Respondent.

## PETITIONER'S REPLY BRIEF

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

HARRY D. GRAHAM,
Counsel for Petitioner,
76 Beaver Street,
New York 5, N. Y.

# PETITIONER'S REPLY BRIEF

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1. *Collision Liability.*

The issue, as stated in the petition, is one solely of law. Its holding, as well as the Court of Appeal's, that because the "MAYFAIR" was under some power at the time of, or immediately prior to, the impact she was "at fault on that account" and, therefore, "a conclusion of negligence was right", is simply a ruling of negligence, *per se.* Claimant studiously avoids the leading case upon this point, *Casement* v. *Brown,* 148 U. S. 615, cited by petitioner in support, and with which the District Court, as well as the Second Circuit's decision, is in conflict. For, as said by this Court in *Casement* v. *Brown, supra,* cited by the Seventh and Sixth Circuits in support of the decisions cited in the petition,

> "the fact that, in this case, they miscalculated the exact location of the submerged pier does not subject them to the condemnation of negligence.
>
> * * * * * *
>
> While it is true the findings state that the pilots knew where the piers are located, and to what extent the work had progressed, having been in the habit of passing there twice a week during the construction, yet it is not to be assumed therefrom that the Court meant to find that these pilots knew the exact height to which Pier 'D' had been carried, the exact stage of the water at the time * * * and also its exact location in the river."

And so, in the case at Bar, there is no question, and never has been, that the Master, who had passed the respondent's structure upon thousands of occasions, knew the general location of the structure. In *Casement,* the structure

was obstructed from view in *clear* weather by being submerged beneath the water and with no markings upon it. In the case at Bar, the structure was obstructed from view by the dense fog and had no markings upon it to warn navigators in the area of its precise location relative to their vessels.

Under such circumstances, the fact that the Master of the "MAYFAIR" judged his vessel's position relative to the structure, erroneously does not spell out negligence as a matter of law. As in *Casement,* his appraisal of the relative position of respondent's hidden structure to the "MAYFAIR" is nothing more than an error in judgment, and is not negligence, much less negligence *per se.*

By failing in its duty,

"to give all *needful warning* to persons and boats"

in the area during the dense fog, having recognized the necessity of doing so in clear weather, the respondent assumed the risk of collision with its fog-hidden structure by vessels in the area.

It is respectfully submitted that a clear conflict between the Second Circuit's ruling of law herein, and this honorable Court's ruling in *Casement, supra,* as well as the other Circuits cited, exists and is an important ruling of law that should be reconciled by this honorable Court.

2. *Substance vs. Procedure—Limitation of Liability.*

At page 11 of its brief in opposition, respondent contends that there is no reason for granting certiorari here because the law is perfectly clear and no conflict exists.

That a clear, distinct, conflict exists between the decision of the Second Circuit in the case at Bar, and this Court's decisions and that of the Seventh Circuit, has been clearly shown.

In *Ohio Transp. Co.,* 203 U. S. 593, cited by petitioner in the petition, the record on file in this Court, No. 486, Octo-

ber Term, 1906, reveals that the petition for limitation in that case is identical in form with the petition for limitation in the case at Bar.

In the *Ohio Transp. Co.* case, *at the request of the petitioner,* the Court appointed three maritime appraisers for the purpose of appraisement of the vessel and her freight.

In the case at Bar, upon *application of the respondent,* the Court appointed *a lawyer* as a "Special Commissioner" to appraise the value of the "MAYFAIR" and her freight.

In the *Ohio Transp. Co.* case, the three marine appraisers fixed the value of the vessel and freight at $66,678.67 and, before any steps were taken to confirm that appraisement and order payment of said sum into Court, the petitioner sought leave to amend its petition and surrender the vessel and her pending freight to a Trustee to be appointed by the Court.

In the case at Bar, as soon as petitioner learned that the "Special Commissioner" was opening hearings (R. 4), petitioner promptly noted its objection to such proceedings, seeking an adjournment so that formal application to the Court for leave to amend the petition and surrender the "MAYFAIR" and her freight to a Trustee, could be made (R. 5, 6). This was denied by the "Special Commissioner" and, over petitioner's objections, he continued with the initial hearing. The motion for leave to amend the petition and to surrender the "MAYFAIR" and her pending freight was filed before the "Special Commissioner" resumed with his second hearing (R. 70) and, upon that hearing, despite the pendency of the motion, the "Special Commissioner" refused to adjourn pending the Court's ruling thereon.

In the *Ohio Transp. Co.* case, as stated by the Seventh Circuit (148 Fed. 187), when the petitioner made application for leave to amend and surrender its vessel and freight, *after* appraisement by the three requested marine appraisers, it thereby

> "apprised the Court that the owner was dissatisfied with, and proposed to withdraw from, the method of surrender through appraisement. By granting leave to file these (the amended petition) the Court *recognized the owner's right, before appraisement was accepted by him or acted upon by the Court,* to dismiss that part of the petition which asked for an appraisement and to substitute therefor the method of transfer to a trustee. *Of the petitioner's right to dismiss before any order is made on an unaccepted appraisement, we have no doubt.*" (Emphasis supplied.)

In the case at Bar, the "Special Commissioner" had not yet appraised the "MAYFAIR" and the District Court (A-1), phrased the issue before it on petitioner's application for leave to amend and surrender, viz.:

> "In short, what the petitioner is seeking is leave to substitute surrender of the vessel and her freight for the ad interim stipulation previously filed. The question presented is whether by filing the order for the ad interim stipulation and the stipulation for value the petitioner has irrevocably elected this form of limitation of liability."

The District Court, in the case at Bar, held in the affirmative as did the Second Circuit, clearly in direct conflict with the Seventh Circuit's *Ohio Transp. Co.* case, *supra,* in which this Court denied certiorari. The contention of the claimant in the *Ohio Transp. Co.* case, when seeking certiorari, was that,

> "to allow surrender in lieu of payment into Court or giving security for payment of value 'as duly ascertained' in this proceeding, *would not be compliance with the statute.*"
>
> (Pet. No. 486, Oct. Term, 1906, p. 4.)

Thus, the Seventh Circuit holds that the petitioner, *without any doubt,* has the *right* to substitute surrender

of its vessel in lieu of accepting an appraisement while, in the case at Bar, the ruling is precisely to the contrary holding the petitioner to an *irrevocable* election of a manner of proceeding.

The Second Circuit's ruling is also in direct conflict with this Court's ruling in the *Scotland*, 105 U. S. 24, cited by petitioner in its petition, and wherein this Court has firmly stated:

> "* * * we may say, once and for all, that they (Rules 51-54) were not intended to restrict parties claiming benefit of the law, but to aid them."

3. *Compulsory References in Admiralty.*

Respondent studiously avoids this Court's decisions on the subject cited in the petition and with which the Second Circuit's decision is in direct conflict as there shown.

4. *The Commissioner's Yardstick of Evaluation.*

Respondent has been unable to point to this record at any place and single out one iota of competent evidence to support the opinions of its alleged "experts", which the "Special Commissioner" found to be "impressive". Nor, does it deny the plain, recorded, fact that comparable sales of about six other vessels, prorated to the "MAYFAIR's" age, show an average market value of $9,500.00, while cost, plus improvements, less depreciation; bring a value in the neighborhood of $9,000.00—figures which correspond with that offered by the ordinary businessman in the trade, the successful outbidder to petitioner for the franchise operation (Pet., p. 25).

The Second Circuit affirmed the District Court's confirmation holding that,

> "In view of the conflicting evidence presented to the Commissioner, we find nothing to warrant reversal of the $30,000.00 valuation."

As this Court has repeatedly stated, a finding is clearly erroneous when, although there is evidence to support it, the reviewing Court on the entire evidence is left with the definite and firm conviction that a mistake has been committed, *United States* v. *Oregon Medical Society*, 343 U. S. 326; *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395; *Mc Allister* v. *United States*, 347 U. S. 932; 1954 A. M. C. 1999, 2001.

For evidence to support a finding, the evidence must be competent, admissible and binding, but nowhere in the Commissioner's report, MAYFAIR, 1954 A. M. C. 977, or in the respondent's brief in opposition, do either single out any competent evidence in support of the finding.

Where an ancient 75-year old vessel costing $15,500.00 in 1947, is valued at $30,000.00 seven years later, in a declining market and when, as the record shows, she is idle and unemployed—an increase of value making a total of approximately 200% of the original, or more if depreciation is considered—the result cannot leave any reasonable doubt that a mistake has been committed.

The ruling of the Second Circuit, in effect, holds that *any* evidence is competent and admissible for the purpose of reviewing the sufficiency of evidence to support a finding.

This, it is respectfully submitted, conflicts with the decisions of this Court, *supra*.

## Summary

The conflicts shown in the petition and in this reply brief, embrace the field of admiralty law and procedure and the wide-spread interests of the shipping industry, the vessels and navigators of all nations using our waters, the owners and operators who may be drawn into the jurisdiction of our admiralty courts as a result of events happening in the course of commerce in this nation and its waters. As such, these conflicts are real and embarrassing, of

public importance to both industry and the admiralty courts and should be resolved by this Court for the guidance of both the admiralty courts and the vast shipping interests.

## CONCLUSION

**For all of the reasons stated in the petition, and herein, a writ of certiorari to the Court of Appeals for the Second Circuit should be granted.**

Respectfully submitted,

HARRY D. GRAHAM,
Counsel for Petitioner.

Dated, April 15, 1958.